

2011 IL App (1st) 100669-U

THIRD DIVISION
September 30, 2011

No. 1-10-0669

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 02 CR 18866
)	
RODZELL FREEMAN,)	Honorable
)	John J. Moran, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justice Murphy and Justice Salone concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err when it denied defendant relief following an evidentiary hearing on his *pro se* post-trial claims and his post-conviction petition, based on the facially exculpatory account of a witness not called at trial, where the court could reasonably conclude that the witness was not credible and where trial counsel gave plausible explanations for not interviewing the witness and for not continuing the trial to obtain her testimony.

¶ 2 Following a 2003 bench trial, defendant Rodzell Freeman was convicted of aggravated possession of a stolen motor vehicle and sentenced to eight years' imprisonment. On direct appeal, we remanded for consideration of defendant's *pro se* post-trial claims. *People v. Freeman*, No. 1-04-0679 (2005)(unpublished order under Supreme Court Rule 23). Following remand, defense counsel

filed a post-conviction petition. The court held an evidentiary hearing on both the remanded *pro se* claims and the post-conviction petition, and defendant now appeals from the denial of relief following that hearing. Defendant's claims in both his post-trial motions and post-conviction petition were based on the fact that an allegedly key eyewitness did not testify at trial, and he contends on appeal that the circuit court erred by refusing to consider the eyewitness's evidentiary hearing testimony sufficient to support his claim of actual innocence, by not granting a new trial based on that testimony, and by improperly relying upon outside evidence regarding the eyewitness.

¶ 3 The trial evidence was to the effect that, at about 1 p.m. on July 9, 2002, two police officers saw a stolen white Buick Park Avenue sedan being driven by a black man with long braided hair. The officers saw the driver's face while pursuing the car, identifying him at trial as defendant, but then lost sight of the driver after the car crashed and the driver and passenger fled on foot. One officer described the driver as wearing dark shorts and a blue jersey over a white t-shirt, while the other recalled only a white shirt and could not recall if he was wearing pants or shorts. The officers did not recall providing a description of the driver that included light blue shorts. Several minutes after the driver fled, one of the officers followed directions from bystanders to a nearby apartment on Winthrop Avenue, where he found defendant in a bedroom closet wearing a white t-shirt but no jersey. Lisa Fitzpatrick, a tenant in the Winthrop apartment, testified that defendant had been there for several hours before the incident and was wearing a gray or white t-shirt and gray pants when he was arrested. Although defendant arrived at the jail wearing a white or light-colored t-shirt and gray pants, the defense investigator who collected the clothing at jail did not know if defendant was wearing those garments upon arrest. Similarly, Fitzpatrick testified that defendant was wearing the collected clothing upon arrest but could not recall if he had earlier changed his clothes. The court convicted defendant of aggravated possession of a stolen motor vehicle and possession of a stolen motor vehicle and sentenced him to concurrent prison terms of eight years.

¶ 4 On appeal, this court found that the evidence against defendant was sufficient to convict him of aggravated possession of a stolen motor vehicle, as the "discrepancy in the description of defendant's clothing did not render the identification made by the officers invalid *** and the trial court was not obligated to believe the testimony of defendant's alibi witness over the positive identification made by the officers." We vacated the conviction for possession of a stolen motor vehicle as duplicative and remanded for the court to consider defendant's *pro se* motions alleging ineffective assistance of trial counsel.

¶ 5 Following remand, counsel appeared for defendant and filed a post-conviction petition. In the petition, as in the *pro se* post-trial motions, defendant alleged that trial counsel was ineffective for proceeding to trial without the testimony of Martinique Holloway, who would have testified that defendant was neither a driver nor passenger in the stolen car, and Marisol Vasquez, who would have testified that defendant was with her in the Winthrop apartment at the time of the offense. Defendant conceded that trial counsel had subpoenaed Holloway and Vasquez but noted that she did not call them as trial witnesses. Defendant also alleged that trial counsel was ineffective for not subpoenaing the "911" dispatcher as an impeachment witness regarding the disparities between the descriptions of the driver of the stolen car and defendant.

¶ 6 The circuit court held an evidentiary hearing on both the remanded *pro se* claims and the post-conviction petition.

¶ 7 Martinique Holloway testified that she was in a car involved in a crash at about 6 a.m. on a summer day in 2002. Earlier, at about midnight, two or four men she met on the street stripped her naked and tried to forced her into the trunk of the car. Holloway's testimony was unclear on how she escaped or left the men: she or they "put [her] clothes on" and "they made [her] walk some neighborhood." When she met one of the men later that morning, she accompanied him because she "felt like I was being forced because of what happened to me earlier." Holloway was driving the car

with the man as passenger, and she made no attempt to flee or signal for help. When a police car started following them, the man ordered Holloway to drive, and she did so until striking a wall. Holloway and the man fled on foot in different directions and Holloway was arrested nearby. (The parties stipulated that she was arrested on July 9, 2002.) When asked at the hearing if she saw the man in court, she twice replied "I don't think so." Holloway was a minor at the time of the incident, and though she lived on the streets for some time, when she was at home her mother refused to allow a defense investigator to interview her. Holloway was in prison at the time of the hearing, upon a guilty-plea conviction for aggravated battery, and had at least one prior conviction for possession of a controlled substance. She had also been diagnosed as having bipolar disorder, psychosis, schizophrenia, and depression, for which she was receiving medication during her imprisonment.

¶ 8 Trial counsel Anne Dykes testified that she subpoenaed Vasquez for trial but did not subpoena Holloway because she was a minor. Dykes interviewed Vasquez but concluded that she would make a poor defense witness due to her nervousness, which tended to "indicate a lack of veracity." Dykes wanted Holloway's testimony, as she had been in the car in question that day, but was not allowed by Holloway's mother to speak with her even on the morning of the trial. Holloway did not attend the trial, but Dykes did not seek a continuance to secure her attendance because defendant would not agree to a continuance despite Dyke's recommendation to seek one and because Dykes believed that the court would not grant a continuance. Specifically, defendant knew that Holloway's mother had shown her defendant's photograph and then told Dykes that Holloway did not know defendant, but with this knowledge defendant still wanted the trial to proceed. Also, not having spoken with Holloway, Dykes knew no more than that Holloway was unable to identify a photograph of defendant and could not know what else she would testify to. At a hearing before trial, defendant had addressed the court personally to demand immediate trial. Dykes also testified

that the police communication records showed that the officers' description of the driver's clothing and hairstyle did not match defendant's clothing and hair upon his arrest.

¶ 9 Following arguments, the court denied relief on the post-trial motions and the post-conviction motion. The court found that Holloway was a minor with "severe mental health issues as well as drug abuse" living on the streets and affiliated with street gangs when trial counsel Dykes tried to subpoena her. However, Holloway's mother would not allow counsel to interview Holloway. This put Dykes "on the horns of a dilemma" regarding whether to proceed to trial: while defendant personally and repeatedly requested a prompt trial, counsel "had no idea whatsoever what" Holloway would say in trial testimony. She could not know whether Holloway's testimony would, on the whole, be helpful or harmful to the defense. Dykes apprised defendant of this situation, and he chose to proceed to trial without Holloway as a witness. As to calling Vasquez as an alibi witness, Dykes believed Fitzpatrick to be a more credible and available witness who could also address the issue of defendant's clothing. Lastly, there were repeated references in the record to the suspect and defendant's braided hair. The court concluded that trial counsel had not provided ineffective assistance and the outcome of the proceedings was unlikely to have been different. This appeal timely followed.

¶ 10 On appeal, defendant contends that the circuit court erred by refusing to consider Holloway's evidentiary hearing testimony sufficient to support his claim of actual innocence. The circuit court also erred by not granting a new trial based on Holloway's testimony, and by improperly relying upon outside evidence regarding Holloway: that she was a gang-affiliated drug abuser with mental health problems.

¶ 11 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test, under which a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v. Gabriel*, 398 Ill.

App. 3d 332, 346 (2010). Specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1037 (2011); *Gabriel*, 398 Ill. App. 3d at 346. The failure to satisfy either prong of this test precludes a finding of ineffective assistance of counsel. *Gabriel*, 398 Ill. App. 3d at 346. Errors in strategy do not constitute ineffective assistance, and trial counsel's decision whether to present a particular witness is generally within this protected realm of strategic choices. *Gonzalez*, 407 Ill. App. 3d at 1037.

¶ 12 Newly-discovered evidence merits a new trial when it (1) has been discovered since trial, (2) could not have been discovered prior to trial by the exercise of due diligence, (3) is material and not merely cumulative, and (4) is of such a conclusive character that it will probably change the result on retrial. *Gabriel*, 398 Ill. App. 3d at 350. Applications for a new trial based on newly-discovered evidence are not looked upon with favor by the courts and must be closely scrutinized. *Gonzalez*, 407 Ill. App. 3d at 1033. Thus, the denial of a motion for a new trial based on newly-discovered evidence will not be disturbed on appeal absent an abuse of discretion. *Gabriel*, 398 Ill. App. 3d at 350.

¶ 13 The denial of a post-conviction petition following an evidentiary hearing is reviewed for manifest error; that is, we will reverse only where an error is "clearly plain, evident, and indisputable." *Gonzalez*, 407 Ill. App. 3d at 1033.

¶ 14 Here, the circuit court could reasonably conclude that trial counsel had rendered effective assistance and that defendant had not established a claim of actual innocence with newly-discovered evidence. After hearing the testimony of proposed witness Holloway and trial counsel Dykes, it was within the court's discretion to assess Holloway's credibility and Dyke's explanations rather than accept defendant's claims at face value. Holloway gave a less than credible account of being

attacked in the street and later accompanying one of her attackers in a car. She believed that the car crash happened several hours earlier than it actually happened. On the key question of whether she saw the man in the car in court, she gave an equivocal answer: "I don't think so." Moreover, the witness was unsure about the date she drove the car into a brick wall, so that the court could conclude that her testimony was unlikely to affect the outcome of a new trial.

¶ 15 As to the court's alleged reliance on extrinsic evidence in assessing Holloway's credibility, Holloway testified that she had "severe mental health issues" and that she had lived on the street. Moreover, Holloway's "drug abuse" could be reasonably inferred from her testimony that she had been convicted of possession of a controlled-substance. We find that the court's overall assessment of her testimony was not manifestly erroneous.

¶ 16 Lastly, Dykes gave credible explanations of why she had not spoken with Holloway before trial and did not seek to continue the trial in Holloway's absence.

¶ 17 We hold that the circuit court did not abuse its discretion when it denied defendant's post-trial motion based on newly discovered evidence. *Gabriel*, 398 Ill. App. 3d at 350.

¶ 18 We also hold that the circuit court did not commit a manifest error when it denied defendant's post-conviction petition. *Gonzales*, 407 Ill. App. 3d at 1033.

¶ 19 Accordingly, the judgment of the circuit court is affirmed.

¶ 20 Affirmed.